

EXHIBIT D

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 Amplify Car Wash Advisors LLC,

4 Plaintiff,

5 v.

22 Civ. 5612 (JGK)OTW

6 CAR WASH ADVISORY LLC ET AL,

Conference

7 Defendants.

8 -----x

9 New York, N.Y.
10 October 31, 2023
10:00 a.m.

11 Before:

12 HON. ONA T. WANG,

13 Magistrate Judge

14 APPEARANCES

15 ARONBERG GOLDGEHN DAVIS & GARMISA

Attorneys for Plaintiff

16 BY: MATTHEW De PRETER

17 PARLATORE LAW GROUP

18 Attorneys for Defendants

19 BY: MARYAM HADDEN
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(Case called)

THE COURT: Please be seated.

MR. De PRETER: Good morning, your Honor. Matthew De Preter on behalf of the plaintiffs.

MS. HADDEN: Good morning, your Honor. Maryam Hadden Parlatore Law Group on behalf of the defendants.

THE COURT: All right. Good morning.

We are here for a status conference. I have your joint agenda. So the first issue I have on your document request to Mr. Caruso. Have you gotten the documents that you have requested? Is that issue right?

MR. De PRETER: No, your Honor. We haven't gotten any of the documents. Should I stand at the podium or the table? What do you prefer?

THE COURT: What's that?

You don't need to use your podium. You can also stay seated if you want to.

MR. De PRETER: Thank you.

No, we haven't gotten any of the documents. We've requested them. It's been months since we have gotten anything. We had a deposition of Mr. Caruso. He testified that there were a number of documents that existed that weren't searched for that would be produced. We served another set of document requests in August and didn't get any responses or objections. There was no response at all to those document

NAV4AMPC

1 questions. There are a number of things that are outstanding,
2 particularly tax records, engagements agreements, closing
3 documents, something called Bright Born documents that all
4 relate to finances, email communications among the team
5 respecting the domains that are at issue that weren't produced,
6 that weren't even searched for. We requested an update on the
7 P&L statement during the deposition of Mr. Caruso. He
8 testified that the P&L that was provided in this case wasn't
9 accurate. He didn't feel comfortable testifying to the
10 accuracy and guaranteed that some of the numbers were wrong.
11 So the issue of the outstanding discovery remains,
12 unfortunately.

13 THE COURT: OK. So as far as document discovery
14 though, is this the last piece of outstanding document
15 discovery?

16 MR. De PRETER: That's correct. This is the only
17 thing we are interested in.

18 THE COURT: All right. Should I set a date for them
19 to be provided, or is there any other explanation why these
20 documents haven't been provided?

21 MS. HADDEN: There was some that there were objections
22 to. There was some back and forth between myself and Mr. De
23 Preter's cocounsel. Although I believe everybody was copied on
24 the chains. A decent chunk of the delay is due to us being in
25 settlement negotiations, which fell through. But there was a

NAV4AMPC

1 period of time where that was where both my focus and my
2 client's focus was. So I have put him back on the task of
3 getting those documents. Other than there are a couple of
4 items where -- for example, the Bright Born securities
5 documents are not documents that would be within our
6 possession, they would be within Bright Born's possession. And
7 I believe there is one other category of documents at least
8 that is something that would involve a decent amount of back
9 and forth in terms of either redactions or discussion with
10 counsel because there are confidentiality agreements in place
11 with those clients. So obviously we're still in that process.

12 THE COURT: OK. When can you get responses and
13 objections to plaintiff's counsel?

14 MS. HADDEN: I would think by the end of the week
15 because I've been going back and forth with my client with it
16 over the last couple weeks.

17 THE COURT: So responses and objections are due
18 November 3rd. When can document production be done then?

19 MS. HADDEN: If I could have one week past that, your
20 Honor. I don't think that would be an issue. There is one
21 other category, the communications category, where my client
22 said there would be hundreds of thousands of pages. So I need
23 to narrow that down with him.

24 THE COURT: Look, as characterized by plaintiff's
25 counsel, some of these things sound like they should have been

NAV4AMPC

1 searched for at the outset of the case and preserved. If we
2 have a preservation issue I want to hear about it.

3 All right. How about documents produced November 17.

4 MS. HADDEN: That's fine. Thank you.

5 And I would disagree with some of the
6 characterizations. But --

7 THE COURT: OK. As to the 30(b)(6) of Car Wash
8 Advisory, is this a sole proprietorship? Why would you need
9 30(b)(6)? Why couldn't you just have an agreement that
10 Mr. Caruso's answers would be binding on the corporation?

11 MR. De PRETER: The reason why I requested a 30(b)(6)
12 Is because last time I had a deposition and I tried to go
13 through the finances of the company Mr. Caruso said that he
14 didn't know anything about them even though he was the one
15 person that is in control of the finances of the company. So
16 when I tried to go through the different portions of where he
17 got distributions from, he didn't know how much that he
18 received in distributions. He didn't know the accuracy of the
19 P&L documents. He said I can't testify to the accuracy. So I
20 wanted a 30(b)(6).

21 THE COURT: Are there other depositions that need to
22 be done, or are in the process? Or are you basically done with
23 depositions other than this issue with Mr. Caruso?

24 MS. HADDEN: I believe we are done with depositions.
25 Frankly, if there is going to be a 30(b)(6) of my corporate

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1 client, I would like to take a 30(b)(6) of their corporate
2 client. One of the reasons I didn't take a 30(b)(6) was
3 because no 30(b)(6) was noticed. Mr. Caruso was deposed back
4 in --

5 THE COURT: OK. Let's back up. So you would want a
6 30(b)(6) of plaintiff because plaintiff wants a 30(b)(6) of
7 defendants? I mean, that's not really how procedure and how
8 depositions work. What's the basis for taking a 30(b)(6)? I
9 understand from plaintiff's counsel, that the reason for a
10 30(b)(6) was because Mr. Caruso's deposition was unclear. You
11 have two options, I think. One would be you get a 30(b)(6)
12 with notice and topics and maybe that's not right.

13 But the other issue is you could say, you know,
14 whether if Mr. Caruso isn't the person then you would get
15 another person who can testify to those answers or Mr. Caruso
16 gets deposed for an additional period of time on particular
17 topics.

18 MS. HADDEN: Honestly, your Honor, that may be what
19 part of the issue is. Because there was no 30(b)(6) with
20 notice and with topics, Mr. Caruso wasn't prepared to testify
21 as to at least some of the questions he was being asked. So
22 without a list of topics it's hard for me to see either if he
23 would be the correct person to be deposed and it would be an
24 extension of the deposition in essence, or if his accountant
25 should be deposed or if there should be two designees on behalf

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1 of the corporation. It was just never noticed.

2 THE COURT: OK. For answers that Mr. Caruso gave --
3 and I'm proposing this as a way to narrow a potential 30(b)(6)
4 or narrow a potential subsequent deposition -- are defendants
5 willing to agree that for answers that Mr. Caruso gave that
6 they would buy the corporation?

7 MS. HADDEN: My only concern, your Honor, is that
8 there were answers where he simply didn't know because he
9 didn't have the paperwork.

10 THE COURT: That's not what I'm talking about.
11 I'm talking about, you know, if Mr. Caruso, for
12 example, testified to a conversation or a business decision
13 where he said, I made the decision or the company and I made
14 the decision or I made the decision on behalf of the company
15 that XYZ would happen. And this meeting happened on whatever
16 date or there was a meeting and I don't remember the date, that
17 the company wouldn't come back and say that there would be
18 somebody else to say there was no meeting.

19 MS. HADDEN: Certainly. To that extent, yes, your
20 Honor, I have no issue with that.

21 THE COURT: All right.

22 How do you propose we proceed, Mr. De Preter?

23 MR. De PRETER: I would just ask by November 3rd we
24 get the answers to the discovery. I guess it's really going to
25 be November 17. I think at this point, objections to the

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1 discovery that we served would be improper. They didn't
2 provide any objections to the --

3 THE COURT: I already gave them a date to provide
4 them.

5 MR. De PRETER: Fair enough.

6 THE COURT: Look, the rules of civil procedure are
7 there to keep cases moving. I understand that this discovery
8 has been outstanding for a while. I also heard from Ms. Hadden
9 that, you know, you may have diverted your energies and your
10 efforts to talk about settlement. So I gave them a new date
11 for the objections and objections. I'm not going to foreclose
12 them altogether.

13 MR. De PRETER: Understood.

14 THE COURT: That said, if they are not meaningful and
15 they're not helpful, if responsive documents aren't produced in
16 short order, then we will have another conference and there
17 will be other orders that we will issue.

18 I want to go back to this issue because it sounds like
19 there's this remaining issue of these documents, and then
20 possibly another deposition, and we're not sure whether it's
21 going to be a 30(b)(6) or a deposition of Mr. Caruso. I'm
22 going to encourage you courage you to meet and confer and come
23 one a plan. Certainly, I could see it in both your interests
24 to simplify things and not have to go through the 30(b)(6)
25 notice and topics process. That said, I think it's in

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1 plaintiff's interest to get a meaningful deposition by at least
2 going through and in your meet and confer process going through
3 with defense counsel and letting them know what it is that you
4 are expecting or needing answers to. And then have a
5 conversation whether it ought to be a 30(b)(6) or whether it
6 ought to be a continued deposition of Mr. Caruso. I'm probably
7 not going to let you have both. Unless there's some showing of
8 shenanigans. OK. I don't expect there to be shenanigans.
9 That's where I'm heading one more deposition to try to get the
10 answers for which, you know, Mr. Caruso testified he didn't
11 know or he wasn't prepared to do.

12 Now, keep in mind though, that sometimes it may be,
13 and this happens with 30(b)(6) deposition as well, it may be
14 that the entity's answer is now I don't know because there is
15 no way to go back to find that answer. If so whatever form
16 that deposition takes, let's make clear that the "I don't
17 know," is going to be the I don't know answer it's not because
18 somebody wasn't sufficiently prepared.

19 If it turns out that all of the stuff is financial and
20 accounting related, it may be better to get a deposition of the
21 accountant with the appropriate documents that you could get by
22 the 17th of November.

23 OK. How does that sound?

24 MR. De PRETER: That sounds good for plaintiffs. I
25 think it would be strange if it was the accountant. They were

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1 never identified as person with knowledge in the case. We only
2 had Mr. Caruso. But that's part of the reason why I wanted the
3 30(b)(6).

4 THE COURT: Sometimes it's the discovery process.
5 Look, I have seen motions for summary judgment in discovery
6 motions where suddenly a witness turns up or suddenly there's
7 another source of information and, you know, there's some back
8 and forth about whether they were initially disclosed and
9 whether somebody should be precluded. Preclusion in those
10 types of measures are, even if not called a sanction are a kind
11 of a sanction. And usually we give everybody at least one
12 chance to get it right and actually get the information and get
13 the case moving along. Because any diversion to something that
14 feels like sanctions takes time, it takes money, it takes
15 energy away from getting the case decided on the merits or
16 resolved in some other way. So I really like to not expand the
17 amount of discovery that we might need. As I understand it, we
18 got these newish document requests based on Mr. Caruso's
19 deposition. And then some further deposition, I'm not going to
20 rule anything out. But my expectation or hope would there
21 would be one deposition that would address the issues of --
22 where Mr. Caruso had a failure of knowledge in his own
23 deposition, whether that's Mr. Caruso being prepped better and
24 sitting for another deposition, whether it's a 30(b)(6) with
25 appropriate preparation or whether it's some other person who

NAV4AMPC

might be better suited in a better position to testify, is the other issue. But let's see what happens from that deposition and if you get the answers that you need.

Why don't you meet and confer on that, and then file a status letter on what you decided or what you propose to do on December 1st. OK. So December 1, joint status letter on plan for the remaining deposition.

All right. Is that it as far as discovery?

MR. De PRETER: There is one other issue from plaintiff's side. After the previously scheduled hearing, we received a number of declarations on behalf of customers that had never been identified previously. The personnel providing these declarations that have never been identified by defendants and they purport to say, well, we as customers had no knowledge of plaintiffs and the website part of what this whole dispute is about, which is the use of our trademark in defendant's websites. So that took us a little bit by surprise. It was after close of discovery and here we get all of a sudden now all of these depositions that purport --

THE COURT: Declarations, you mean?

MR. De PRETER: Excuse me. Declaration. Declarations from these individuals that that are trying to backfill the knowledge of defendants.

THE COURT: OK.

MR. De PRETER: To go through and have to now, at this

NAV4AMPC

1 late stage, depose those people I think would be burdensome and
2 inappropriate. If they had been identified earlier on in the
3 case, we would have taken discovery from them. We had
4 initially issued subpoenas to some of the customers who we
5 believe might be involved, and those were all ignored. To now
6 find specific individuals that were here to provide sworn
7 statements was a little bit surprising, to say the least.

8 THE COURT: Ms. Hadden, what are your thoughts on
9 that?

10 MS. HADDEN: As discovery was coming to a close my
11 client contacted me and asked whether or not it would be useful
12 for him to ask any of his customers how they came across his
13 website or came into contact with him. I said that he
14 certainly could do that. If he could do that, it would be most
15 useful if we could provide it to counsel in a clear, uniform
16 format. He emailed them to me. I emailed them to counsel. It
17 was actually early in the morning of me being stuck in an
18 airport, and I was sending emails, and I neglected to say this
19 earlier, I apologize to the Court that I wasn't available on
20 the last date. None of these individuals, obviously, are
21 employees of the defendants. They are customers, who I believe
22 for most part the businesses were all listed on my client's
23 website as a successful transaction on behalf of Stevie's car
24 wash, I'm making up a name here, something along those lines.
25 So essentially it was my client doing his own research in an

NAV4AMPC

1 effort to be overly helpful, which is of course not always
2 helpful. There are certainly individuals who were in the
3 common realm in terms of being identified as customers of CWA
4 and they are publicly posted on the website as successful
5 transactions. In essence, all this boils down to there never
6 was any traffic from the domain in question. And one of the
7 reasons my client has, you know, continually gone back in an
8 efficient to settle, and I don't know whether or not a
9 settlement conference through the Court would be helpful or
10 not. I don't know if the plaintiffs would be helpful for not.

11 Essentially, we are dealing with a case where there is
12 as best as anything if in the discovery from either side
13 revealed so far, there was no damage. There were no customers
14 who came to the website through this link. There was no
15 traffic through the link. There was just no "there" there. So
16 my client is flailing around trying to find other ways making
17 it clear that there was no "there" there.

18 THE COURT: I think this might actually be a grounds
19 for an additional deposition of Mr. Caruso, what he did. It
20 doesn't seem like it would be privileged other than if he asked
21 questions about helping to support traffic to the website, but
22 I think that's a fair area of inquiry. And that might actually
23 lead to at least a short deposition of Mr. Caruso even if it
24 turns out that a deposition on the financial questions for the
25 corporate defendant is given by somebody else. OK?

NAV4AMPC

1 MS. HADDEN: That's understood.

2 THE COURT: Why don't you let me know the plan in the
3 December 1 letter. I'm not foreclosing any request for relief
4 related to that because this does seem like something that if
5 it happened earlier and during the earlier time when discovery
6 was active and wide open, you know, I would have allowed
7 subpoenas to go out. Now, I'm really trying to corral the
8 discovery and get it closed up so that we can move on to the
9 next stage.

10 OK. All right. Anything else we need to talk about
11 as far as discovery?

12 MS. HADDEN: I don't believe so.

13 THE COURT: I mean, I didn't see anything else on your
14 joint agenda?

15 MR. De PRETER: The outside discovery goes a little
16 bit beyond some of the financials. We communicated back and
17 forth about things outstanding. If it's helpful for the meet
18 and confer to send a follow up letter, again, detailing what it
19 is we are looking for. But there is no other specific issues.

20 THE COURT: Why don't I set the discovery end date
21 right now to be December 22. The reason why I'm setting
22 December 22 is my hope is you will have an agreed on a plan, on
23 a clear enough plan to tell me what it is in the December 1
24 letter as well as maybe scheduling a deposition or two to be
25 done by the 22nd. I think that's a nice closure, nice time to

NAV4AMPC

1 close discovery. That said, if it turns out that more things
2 plop out or something else happens or something isn't actually
3 done well enough, I may consider if there's any disputes or
4 anything that needs to be cleaned up, I can consider after.
5 But my understanding, my hope is that by December 22, you'll at
6 least hopefully have done the remaining deposition or
7 depositions that need to be done, you'll have gotten remaining
8 the documents from the August doc requests to Mr. Caruso. And
9 then we'll either be done, or we'll be close to done by the
10 22nd. And when I say close to done by the 22, I mean you have
11 done everything you can to try to schedule the necessary
12 depositions before the 22nd but it's witnesses not available
13 that makes it difficult. I don't want you to say just I don't
14 want to deal with this before Christmas or New Years and push
15 it to January. That's not going to go.

16 Since I have a joint status letter coming from you on
17 December 1st, I think that should be enough for us to keep
18 track of the case. I agree with you that dispositive
19 motions -- it would not be appropriate or right now to set a
20 schedule for dispositive motions.

21 And then we can after we conclude the public part of
22 this conference, I'm going to let the court reporter off. We
23 will go off the record, and I'm going to have a private
24 settlement discussion with you to understand where and how the
25 settlement discussions broke down, and see if there's any

NAV4AMPC

1 window to try to resolve the case.

2 MR. De PRETER: Yes, your Honor. Just to be clear,
3 there is August discovery and some of the other discovery
4 requests were just supplements of discovery that we served
5 earlier. The documents would fall underneath some of the
6 things that Mr. Caruso has said. I can get those for you.
7 They can technically be a supplement to our previous discovery
8 request.

9 THE COURT: I'm not sure I understand.

10 MR. De PRETER: So we served discovery. Discovery was
11 provided. We got to the deposition. Some of the things he
12 testified existed would be within the discovery request being
13 filed previously.

14 THE COURT: You also served supplemental ones?

15 MR. De PRETER: And then we served an additional set
16 in August.

17 THE COURT: I understand. All of those documents
18 should be produced unless there's some real problem that hasn't
19 come up yet. They should be produced by the 17th.

20 MR. De PRETER: OK. Thank you.

21 THE COURT: All right. Anything else we need to do on
22 the record at this time?

23 MR. De PRETER: Not from plaintiffs.

24 MS. HADDEN: Not from the defendants.

25 THE COURT: All right. Thank you very much. We are

NAV4AMPC

1 adjourned. I'm going to request that you order a copy of the
2 transcript and share the costs 50/50. I'm going to step off
3 the bench now.

4 (Adjourned)